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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 208

NANNIE MAY WILLIAMS, PETITIONER,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY, RESPONDENT.

SUPPLEMENTAL BRIEF OF PETITIONER.

The brief in support of the petition for writ of certiorari and this supplemental brief are submitted as petitioner's brief on the merits.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is reported in 65 F. (2d) 240.

II.

Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals is May 25th, 1933; the date of the judgment of the trial court is October 21st, 1932.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 347, Title 28 (U. S. C. A.), U. S. Code; Section 240 of Judicial Code as amended February 13, 1925; 43 Statutes 938.

3. The petition for writ of certiorari was granted October, 9, 1933.

Statement of the Case.

In addition to the statements contained in the petition and supporting brief, it is deemed proper to submit a supplemental statement relating to the "second phase of the case". As stated in the petition, the whole controversy revolves around two principal questions:

1. The applicability and the application of the 1931 dividend for insurance benefits.

2. Whether the insurer is relieved of liability by the transaction on September 18, 1931, in which insured signed a dividend order in favor of Lee & Lee, General Agents of respondent, covering the dividend on the policy and several others, and in which transaction the insured executed a note in the amount of $914.77, payable to the order of The Union Central Life Insurance Company.

With reference to this transaction, which is referred to by the phrase, "second phase of the case", petitioner pleaded mental incompetency of the insured, mistake and fraud.

Respondent's contentions are, as we understand them: First, That there was no insurance in force on September 18, 1931, or at any time after July 11, 1931, the date of the expiration of the days of grace; Second, If there was insurance in force extending the policy beyond the date of the death of the insured, said insurance was wiped out by the transaction of September 18, 1931, and the payment by the

insurer to its General Agents of the amount of the purported dividend order.

Believing that the first contention is fully answered by the authorities cited and propositions submitted in the brief filed with the petition, petitioner will restrict the scope of the supplemental brief to a discussion of the second contention, or second phase of the case.

The so-called "dividend order" relied on by respondent appears on pages 150-151 of the transcript, reading as follows:

"September 18, 1931.

STATE OF TEXAS,
County of Irion:

To the Union Central Life Insurance Company of Cincinnati, Ohio:

GENTLEMEN:

You are hereby authorized and directed to pay to Lee & Lee, of Dallas, Texas, the sums due me as dividends on policies now lapsed, as follows:

Policy:	Amount of dividend.
#937853	$112.20
#940457	74.80
#989356	184.75
#989357	184.75
#989358	110.85
Total Amount of Dividends	$667.35

(Sgd.) P. H. WILLIAMS.

Witness:
(Sgd.) GEO. T. LEE."

George T. Lee, an attorney and the son of one of the general agents, went with his brother-in-law, Hervey Humlong, to the farm of P. H. Williams, and secured his, the

said Williams', signature to said instrument. At the same time the insured signed a note in the amount of $914.77, due on or before twelve months after date and payable to the order of The Union Central Life Insurance Company. (Tr., page 99.)

P. H. Williams was indebted to said Lee & Lee in the amount of $1,643.63, with interest from June 20, 1930, at the rate of six per cent per annum, said indebtedness being evidenced by a note due on or before six months after June 20, 1930.

As the cash resources of the said Williams had dwindled to such an extent that he was unable to pay said indebtedness or any part thereof, the said general agents and the local agent at San Angelo, Charles A. Poteet, had for some time been endeavoring to persuade or induce the insured to "cash in" on his insurance policies, to sign surrender forms, and to transfer to the said Lee & Lee all the sums accruing to him under said policies. It appears that it was suggested to him that he might use a part of the money to continue one policy,—a $15,000 policy,—in force for a full year, under which arrangement Lee & Lee would obtain approximately $500.

To these suggestions the insured returned, in the words of the general agents, a "cold-blooded refusal"; said, "It was a crooked deal, and that he was going to have every nickel applied towards paying these policies as far as it would carry them." (Transcript, page 97.) According to the letter from Lee & Lee to the home office of respondent, said letter appearing on pages 96 and 97 of the transcript, they had been endeavoring ever since June 10, to work out some such arrangement; and with no success whatever.

Accordingly, they had Mr. George T. Lee prepare the "dividend order" herein above set forth, and the note to The Union Central Life Insurance Company, in the amount of $914.77; and sent him from Dallas, Texas, to San An-

gelo, Texas, where he joined Mr. Humlong before proceeding to the farm of Mr. Williams, some twenty miles distant from San Angelo.

The jury found that on September 18, 1931, the said P. H. Williams did not have sufficient mental capacity or sufficient reason to understand the nature and effect of said transaction.

"And the finding of the jury upon that question must be allowed to stand unless all reasonable men exercising an unprejudiced judgment would draw an opposite conclusion from the facts." *Story Parchment Company* v. *Paterson Parchment Paper Company*, 282 U. S. 555, 51 Sup. Ct. 248. (Quotation is on page 252, immediately preceding Section (7) 51 Sup. Ct.).

Petitioner assumes that this Court will, under the applicable doctrine announced in the above-cited case of *Story Parchment Company* v. *Paterson Parchment Paper Company* (conclusion of opinion, p. 252 of 51 Sup. Ct.), consider respondent's assignments challenging the sufficiency of the evidence to show mental incapacity, fraud or mistake.

The petition for writ of certiorari seeks a complete review and determination of the entire cause; the prayer concluding as follows: "To the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by the court, and for such further relief as to this Court may seem proper."

Seeking an affirmance of the judgment of the trial court, petitioner submits, under subdivision IV hereof, a specification of points answering respondent's assignments relating to the sufficiency of the evidence to show mental incapacity; and relating to the questions of fraud and mistake.

IV.

Specification of Points.

1. The verdict of the jury, involving a finding that the insured did not have sufficient mental capacity to understand the nature and effect of said transaction of September 18, 1931, is based upon competent and sufficient evidence.

2. The purported dividend order dated September 18, 1931, is unavailing to respondent because same was procured by fraud.

3. Even under respondent's contentions and under respondent's own evidence, the purported dividend order was signed by the insured under a mistake as to his rights; said mistake being induced by acts and representations of respondent and its agents.

V.

ARGUMENT.

Point I.

The verdict of the jury, involving a finding that the insured did not have sufficient mental capacity to understand the nature and effect of said transaction of September 18, 1931, is based upon competent and sufficient evidence.

The testimony relating to this feature of the case covers approximately 53 pages of the record (pages 102-143, 145-158). Some fifteen witnesses testified—including the plaintiff, and Mr. George T. Lee, who testified by deposition, and Mr. Humlong, who accompanied Mr. Lee on the occasion in question.

To set out herein in anything like a comprehensive manner all the testimony of these witnesses, would extend this brief to great length; and unnecessarily so, as it would simply involve copying into the brief what appears in the transcript.

We respectfully submit that the evidence, while conflicting, was such that reasonable minds might draw different conclusions, one of which conclusions would sustain the plaintiff's claim, and the jury having resolved the conflicts in favor of the plaintiff (petitioner), the verdict should stand. *Story Parchment Company* v. *Paterson Parchment Paper Company*, 282 U. S. 555, 51 Sup. Ct. 248; *Wharton* v. *Aetna Life Insurance Company*, 48 F. (2d) 37, (Certiorari denied, 52 Sup. Ct. 9); *Sprencel* v. *United States*, 47 F. (2d) 501.

The following quotations are taken from respondent's brief in opposition to the petition for writ of certiorari, pages 113-114:

> "The evidence in this case fairly shows that Williams had been undergoing a change in his physical and mental condition prior to the date on which he signed the instrument in question. That he was a sick man suffering from a physical malady, which a month later, resulted in his death, cannot be denied. As a result of financial reverses and sickness, he was despondent. On two occasions he had contemplated suicide, but reason seems to have prevailed with him each time, as he continued to live, and died a natural death. He showed some evidence of absent-mindedness, and forgetfulness, also in matters such as the counting of numbers and orders given to hired hands. He kept more to himself than formerly, had less to say to acquaintances, and exhibited less interest in them. He had become irritable, and cross on occasions." * * * "The fact that Williams had about three degrees of fever on the morning of the 18th of

September, and that his gums undoubtedly had bled some during the twenty-four hours following the extraction of the teeth, and preceding the conversation with George Lee and Humlong and the act of signing, shows beyond peradventure that the deceased was in a weakened condition." (Quotation begins with last paragraph on page 113.)

Yet respondent anathematizes the plea of mental incapacity as a "fanciful claim"; and points to Mahatama Gandhi, across the seas, as a "striking illustration of a man intensely weak physically and yet intensely strong intellectually." (Page 114 of same brief.)

Before proceeding with the further discussion of the evidence, we pause to consider the legal criterion of mental incapacity.

The following quotation is taken from 32 Corpus Juris, 727, Section 496:

"Nature and Extent of Incapacity to Contract—(1) In General. The test of mental capacity to contract is whether the person possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged; and in order to avoid a contract it must appear not only that the party was of unsound mind or insane when it was made, but that this unsoundness or insanity was of such a character that he had no reasonable perception or understanding of the nature and terms of the contract. *However, the insanity need not be so great as to dethrone his reason or as to amount to an entire want of reason,* but it is sufficient if he is insane to such an extent *as to be incapable of comprehending or understanding the subject of the contract and its nature and probable consequences.* The incapacity may result from lunacy, idiocy, senile dementia or imbecility, *or any other defect or disease of the mind, whatever the cause,* including that resulting from habitual drunkenness" (Italics ours).

The following quotation is from Texas Jurisprudence, Volume 24, page 377:

> "'Capacity' is a comparative term that varies according to the act to which it is referred. A person may be quite capable of performing certain reasoning functions of the mind, yet be wholly incapacitated as to others. 'The general definition of the term "mental capacity" seems to contemplate the ability to understand the nature and effect of the act in which a person is engaged and the business he is transacting.' In lunacy inquisitions and proceedings to appoint guardians for persons of unsound mind, the general mental condition of the subject is in issue; but in other cases the law is concerned chiefly with the question *as to the ability of the person to comprehend the effect or consequences of the particular act under investigation.* For example, *the test of the mental capacity of a person to make an ordinary contract is the ability to understand the nature and probable consequences of his act of entering into the agreement*" (Italics ours).

The evidence shows that for many months prior to September 18, 1931, a fatal disease, cirrhosis of the liver, had been sapping the life of P. H. Williams. The said malady was accentuated and its course hastened by an injury which he sustained during the early part of August, 1931, when he was kicked in the abdomen by a bull "yearling." From then on, he was afflicted with headaches, hiccoughs, shortness of breath, and fever, almost constantly until the date of his death, October 15, 1931, he being then 55 years of age (Transcript, page 103).

A general mental decline was noted by most of those closely associated with him; evidenced by loss or lapse of memory, moroseness, unsociability, excessive worry, and changes in his general personal characteristics. Normally active, energetic, optimistic, sociable, and easy-going, he became so morose as to talk of suicide. These changes

were noted by some in the latter part of 1930, or in the early part of 1931, and by others in the spring and summer of 1931 (Transcript, pp. 118, 119, 121, 122 3, 125, 127, 129, 130).

Mr. Williams had been engaged on a large scale in the oil business. In the latter part of the year 1930 and early part of the year 1931, he had suffered heavy financial losses, as the result of which he faced financial ruin. He abandoned the business of drilling wells for a life on the farm.

The testimony of two farm hands, Jordan and Mabry, shows that after the injury in August, he gave orders impossible of execution, became unreasonable in his exaction and requirements as to the conduct of the farmwork; would frequently forget orders he had given and upbraid them for doing the very things he told them to do. He would sit at the steering-wheel in his car in the field apparently in a stupor, oblivious to his surroundings (Transcript, pp. 118, 123).

Another witness observed him in his car on the streets of San Angelo, sitting at the steering-wheel for as much as forty five minutes, bowed and bent over the wheel, and paying no attention whatsoever to what was going on about him (Transcript, page 128).

Broken in health and broken in spirit, he had been crushed by overwhelming odds.

The latter part of August and the early part of September, 1931, Mr. Williams went through extensive physical examinations at the San Angelo Medical and Surgical Clinic. The X-ray and laboratory findings indicated that he was suffering from a serious disorder, the physican in charge of the case, Dr. Nibling, being of the opinion that he was suffering either from a condition of malignancy or

cirrhosis. No definite diagnosis was made. X-rays of the teeth disclosed several pus pockets.

On the morning of September 17, 1931, all of his teeth, some fourteen in number, were extracted; a local anesthetic was used.

In the afternoon of that day September 17 he was taken from San Angelo to his farm in Irion County, a distance of twenty miles. He spent a sleepless night.

Mrs. Williams testified: "He didn't sleep any that night and he didn't rest a particle. He had the hiccoughs all night, and his teeth bled all through that night clear through the pillow, terribly. (Transcript, page 105).

She further testified that he had fever that night and the next morning. She testified that she took his temperature between seven o'clock and eight o'clock on the morning of September 18, and it was between 100 and 102 (Transcript, page 105). She further testified:

> "About 10:30 the morning of September 18, the morning after he had his teeth pulled, two men came out. I heard someone in the front room, the living room, and I went to the dining room door, which opens into the living room, and Mr. Williams was sitting in the chair, and two other men were sitting there. I did not take part in the conversation. I was trying to clean things up, and I had not even started dinner when the men came. I started dinner about 10:30, immediately after they came, in order to have it ready by noon. The men were still talking to Mr. Williams at noon, when Mr. Jordan, a hired man, came in for dinner. We waited dinner a little bit, and then we went ahead and ate. He finished dinner, and had been gone about ten minutes, when those men left, about 12:30 or a little later.
>
> "The men were there, anyway, two hours. I could not repeat their conversation one sentence after another. I was in the dining room. Between it and the

living room there was a place for a door, but no door, just curtains hanging on each side. I did not pay any attention to them until I heard the name 'Poteet' repeated several times. I knew by repeating "Poteet" they were talking about life insurance (Mr. Poteet was respondent's local agent at San Angelo).

"One man would talk and then the other would talk. One would say, "It is this way, Mr. Williams," and they would talk and talk. Then Mr. Williams would say, "Well, gentlemen, I am a sick man today; I am not able to do anything today. I will be in town in a few days and see you there." About the time he would get the sentence halfway out, the other man would start up and say: "But this is how it is, Mr. Williams"; and by that time the other man would come in. They kept that up until about 12:00 o'clock.

"Q. Did you hear Mr. Williams say that he would sign or was willing to sign?

"A. I didn't know there was anything concerning signing; I just heard them say those words. Every sentence he would start, he would tell them he was a sick man and was not able to talk to them.

"I did not hear them talk about anything else; I didn't hear them talk about livestock or farming or anything of that kind.

"The house is just a little box house, of five small rooms. The living room was 10 x 20 and it was twice as large as any other room; the rest of them were 10 x 10. September 18, 1931, was a very hot day. Everything was open. The doors between where I was preparing the meal and the room where the business transaction was taking place were open. While in the dining room, whenever I listened, I could hear the conversation clearly. I could see Mr. Williams from where I was working. He was sitting in a big rocking chair, kinda stooped down this way part of the time, and part of the time kinda moving around. A cuspidor was at his side.

"No one else was in the house. There were some Mexicans living about two blocks away.

"A little after those men left I went in there. Mr. Williams was just slumped down in his chair, like this, down and out, with his arms this way. He let me take him by the arm and help him up, but he said he did not want any dinner. I insisted that he go to the table, and I poured him some coffee, which he just tasted. I helped him to the bed in his room, where he sat down on the bed and took some aspirins, and I slipped his shoes off and straightened him out on the bed. I put a wet towel on his forehead. I took his temperature, and it was between 102 and 103 and that scared me, and I telephoned to my son in San Angelo to bring some ice out and to take us back to the doctor.

"My son came. We waited until it got cooler, and then we took Mr. Williams back to town, after sun down.

"Dr. Nibling was out on a case, but we summoned Dr. McAnulty to give Mr. Williams a hypo, as Mr. Williams was hiccoughing so terribly.

"Mr. Williams didn't rest at all. His teeth bled almost in a stream this whole time, from the time they had been pulled out. Mr. Williams slept until about 3:00 o'clock. He waked up with the hiccoughs, and they were as bad as before he went to sleep. He had a high fever. His teeth were bleeding almost in a stream. I called Dr. Nibling, who knew of a nurse in the hotel, and he said to have the nurse pack some cotton hard against Mr. William's gums, and have Mr. Williams bite down on the cotton, and we did this. Dr. Nibling came the next morning.

"From that time on Mr. Williams was a mighty sick man. We changed to Dr. Marberry about the first of October" (Tr., pp. 105-108).

Of similar import is the testimony of Jeff Jordan, the farm-hand (Tr., pp. 116-118).

The testimony of Mrs. P. J. Webb is quoted in full as follows:

"I live at the Central Hotel in San Angelo. I am the proprietress, and have been almost seven years.

"I was acquainted with P. H. Williams during his lifetime. I knew him fully five and a half years. Soon after I commenced running the hotel he and his wife stayed there for about two years and a half.

"I recall Mr. Williams' accident at his farm during August, 1931. I first saw him when he came to the hotel, possibly a week afterward, and asked if I had a room where he might lie down for a short time and rest; that he felt bad. He stayed until late in the evening, until it was cooler, before he went back to his farm. It was a Saturday afternoon—I think it was August 22nd. He had been to see a doctor and had some medicine that he took after he got to the hotel. He complained of a headache and a hurting in his side, and I bathed his face with a towel and ice water. His temperature was very high, around 104. I had been a practical nurse. He was back again on the following Monday. At that time he went to his daughter-in-law's room and lay down the biggest part of the day. For the next several days he was very sick, and someone would drive him back to the farm in the evening and bring him in the next day. He came in almost every day until about September 11th, when he registered for a room. He was coming in to see the doctor a part of the time, going to the Clinic. One day he had the doctor up to the hotel before he took a room. He was hiccoughing and had the doctor to get some relief.

"I remember that he had his teeth extracted on the morning of the 17th of September. After going to Dr. Chase's office and having all of them extracted, he came back awfully nervous and sick, and went to his room and lay down, but not until after he had rested at the head of the stairs awhile. He was up and down. His gums were bleeding terribly and he had to sit up most of the time, on account of so much blood coming from his mouth. After sundown he went out to the farm.

"I saw him the next evening, late, between sundown and dark. When he came in his gums were

bleeding terribly and he was exhausted and sick. We got him in his room as soon as he was able to go there, and called for a doctor. Dr. Nibling was out, and Dr. McAnulty came, about eleven o'clock, gave Mr. Williams a hypo and tried to check the excessive bleeding of the gums. About thirty or forty minutes later Mr. Williams dropped off to sleep a little bit. Then he waked up again, and his mouth was so filled with blood he began spitting up blood. That frightened his wife, and we tried to get a doctor again; it must have been around 2 o'clock in the morning. He said to have the nurse in the house on another case pack his gums, and the nurse took some cotton and packed them and tried to stop the bleeding. Mr. Williams did not leave the hotel any more after that, and he died at the hotel.

"When I first knew Mr. Williams he was a very active man, brimful of energy. He was so full of energy that he went day and night at times. He was in the oil business. I noticed a change or difference in Mr. Williams several times, about July and August, especially throughout the month of August I could tell that he was failing. He looked weaker, and didn't have the strength to do as he had done before.

"While Mr. Williams was at the hotel, he did things I had never seen him do before. I would try to give him the medicine and he would just refuse to take it; he would spit the medicine right into my face. And on one occasion he grabbed me by the arm and clinched it and stuck his nails into my flesh until it brought blood, and he had never done anything like that before. That was, I should judge, about eight or ten days before his death. I don't recall any other incident showing a change in Mr. Williams" (Tr., pp. 120-122).

The testimony of Dr. A. J. Marberry, in full, is as follows (Tr., pp. 113-116):

"I have lived in San Angelo about thirty years. I have been practicing medicine since 1881. I treated P. H. Williams professionally about the last of Sep-

tember, 1931, and attended him up until about the time of his death. The cause of his death, in my opinion, was cirrhosis of the liver and abdominal dropsy or ascites. In the usual case of cirrhosis of the liver the disease is very slow and long-continued, some of them lasting many years. In most cases there is enlargement in the beginning and shrinkage later. Where cirrhosis runs a normal course, there would not be much reaction upon the mind or brain, but where there is a good deal of infection or ascites, shortness of the breath and weakness of the heart, there would be a reaction on the mind as well as on the body. The patient would be feeble all over.

"By 'ascites' is meant an accumulation of water in the abdomen. I tested Mr. Williams three times for water, and on the first time I drew off about two gallons, and almost that much the other times. The water accumulated very rapidly, more so than I have ever seen.

"An injury inflicted to the right side in the region of the liver I think would aggravate the ascites condition. In this particular case, the fluid accumulated probably was caused by an injury to the blood vessels, a plugging of the veins. The blood, being dammed back, could not get through the liver back to the heart. It would be like pumping water into a bag that would let the water leak out. That same thing takes place in the blood vessels. They are distended or strutted. The heart pumps the blood into the spleen, intestines and all those things. The arteries pump it in and the veins carry it back. From the abdominal cavity it has to return to the heart through the liver. If it cannot go back as fast as it is pumped in, there is a distention of the vessel that causes a hemorrhage from the stomach, bowels, etc.

"The liver is the organ that principally burns up or destroys the poisons of the system, of the blood; it purifies the blood as one of its functions. In Mr. Williams' case, the liver was exceedingly small. Normally it would weigh three or four pounds, but his

liver would have weighed probably two pounds. This would indicate that the glandular substance of the liver had been destroyed and replaced by a fibrous tissue that has no function; it is the glands in the liver that purify the blood.

"Q. Now, the condition of the liver, does it have anything to do—does this ascites condition or general condition you found Mr. Williams to be in—would you say that condition would have any reaction or operate upon his mind or mental capacity?

"A. Well, you might say indirectly.

"Q. In what way?

"A. In the first place, the extreme distention of the abdomen and the rendering of the breath very shallow, and he was very short of breath, panting for breath—that would be one thing; and it would weaken the heart. The blood being dammed back, the heart forcing the blood in trying to get to it around—it would overpower the heart, the heart would become weakened, depending upon the nature of the case, the amount of fluid accumulated, etc.

"Q. Would that condition in your opinion be reflected in his mental state in any way?

"A. Indirectly. As the liver cannot purify the blood, the blood becomes toxic or poisoned. That would of course react, and cause, in some cases, a little fever; in other cases a muddy, ugly condition of the skin. Of course, toxic conditions would always affect the general system as well as the mind. The history of the case showed that he had infected teeth. That, of course, would poison the blood, and the liver would be unable to destroy those poisons. Then, again, he had no acid in the stomach; the stomach glands were destroyed, and there was soapy mucus, showing an inflammatory condition of the stomach. The stomach secretes hydrochloric acid, which acts as an antiseptic to destroy the intestinal poisons. Then there are poisonous materials in the stomach that are absorbed from the stomach and from the duodenum and the intestines.

"Poisons or toxins accumulate, and the liver is not able to destroy them. A toxic and weakened condition results—a weak heart, weak respiration, shallow breathing. All of these things taken together, with the toxic condition, would of course enfeeble the whole system. He was extremely feeble, barely able to walk at all—not only feeble in body, but all the way around. You would not call it insanity, but a feeble, incompetent condition, you might say. The body was of course feeble, too, very, very, feeble.

Cross-examination:

"I made no X-rays. When I first saw Mr. Williams there wasn't anything to do except draw the fluid as a palliative measure. He was in a manner dead. After the fluid was drawn off, about the only change was that he would breathe a little better. Yes, this disease of the liver is one of long, slow development. Before it reaches an acute state when you have to tap a man, his condition of course varies, and he has his ups and downs; that is true of every disease."

Dr. F. S. White, a physician and a specialist in nervous and mental diseases, honored by the State of Texas with positions of trust and confidence, testified:

"As to what schools of medicine I am a graduate of, I graduated first from the Central College of Physicians and Surgeons at Indianapolis (now merged with the University of Indiana), and since then I have taken several post-graduate courses in New York. I have been practicing medicine since 1884, being in the general practice ten or twelve years; and since then, for at least 25 years, I have been specializing in nervous and mental diseases. I have been superintendent of all the hospitals of the insane in Texas, except the one at Rusk. My official connection lasted 15 or 20 years. Then I operated a private sanitarium at Wichita Falls for nervous and mental diseases. I am engaged in private work at San Antonio now. The

state asylums or hospitals I was connected with were at Terrell, Austin, San Antonio and Wichita Falls'' (Tr., pp. 131-132).

In answer to a hypothetical question briefly outlining plaintiff's testimony, and asking his opinion as to the mental power and capacity of P. H. Williams on September 18, 1931, to weigh, understand, and consider the nature and effect of a business transaction, Dr. White, after the court had overruled somewhat lengthy objections to the question, gave the following answer:

> ''I will answer that question assuming all of these statements are true; and assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper'' (Tr., p. 139).

The principal objection made by respondent to the question propounded to Dr. White was that the sum total of the evidence introduced forming the basis for the framing of the hypothetical question was insufficient for such purpose; respondent contending that no case had been made out by such evidence from which it might be reasonably inferred that at the time the instrument was signed by Mr. Williams he was incapable of understanding the nature and effect of the transaction.

Other objections related to alleged inaccuracies and alleged exaggerations.

From respondent's brief in opposition to the petition for writ of certiorari, we gather that respondent concedes the alleged inaccuracies, with one exception, to be of minor significance and immaterial.

Concerning the alleged immaterial inaccuracies, respondent says on pages 134-135 of its brief:

> ''A few other minor exaggerations or unsupported statements could be mentioned. Perhaps such ex-

aggerated statements or misstatements would not be sufficient in and of themselves to require a reversal on account of the Court's admission of the doctor's answer, over the objection of [redacted] defendant's attorney, if it were not for the further fact that such question contains a misstatement which we believe should be regarded as material and highly prejudicial, and, therefore, so important an error as to require a reversal."

"The misstatement now referred to is as follows:

> "In the afternoon or early in the evening or night of September 18th he became—to those surrounding him, to his wife—so weak and his gums bleeding so much that she returned with him to San Angelo, to the Central Hotel, arriving there on the night of September 18th" (Tr., p. 207).

"Mrs. Williams was the only one to testify as to what happened on the afternoon of the 18th, and her whole testimony on said subject is as follows:

> "'I helped him to the bed in his room, where he sat down on the bed and took some aspirins, and I slipped his shoes off and straightened him out on the bed. I put a wet towel on his forehead. I took his temperature, and it was between 102 and 103, and that scared me, and I telephoned to my son in San Angelo to bring some ice out and to take us back to the doctor.
>
> "'My son came. We waited until it got cooler, and then we took Mr. Williams back to town, after sundown' (Tr. pg. 107).

"It is seen from such quotation that Mrs. Williams decided to go back to town and summoned her son for such purpose solely because she was scared after taking Williams' temperature and finding that it was between 102 and 103. She made no reference to his condition of weakness or to his bleeding gums as being any cause for the decision to return to San Angelo."

We quote from the further testimony of Mrs. Williams on the same page of the transcript, 107, commencing with the sentence immediately following the above quotation by Respondent:

> "Dr. Nibling was out on a case, but we summoned Dr. McAnulty to give Mr. Williams a hypo, as Mr. Williams has hiccoughing so terribly.
>
> "Mr. Williams didn't rest at all. His teeth bled almost in a stream this whole time, from the time they had been pulled out. Mr. Williams slept until about 3:00 o'clock. He waked up with the hiccoughs, and they were as bad as before he went to sleep. He had a high fever. His teeth were bleeding almost in a stream. I called Dr. Nibling, who knew a nurse in the hotel, and he said to have the nurse pack some cotton hard against Mr. Williams' gums, and have Mr. Williams bite down on the cotton, and we did this. Dr. Nibling came the next morning."

Dr. Nibling testified that on the night of September 18th, when he was called over the telephone, he advised that Mr. Williams' gums be packed "until he could see the dentist with reference to stopping the hemorrhage from the gums."

He further testified that on the 20th and 21st of September, Mr. Williams was spitting blood, "holding ice in his mouth, trying to stop the hemorrhage" (Pages 110-111, Tr.; bottom of page 110, top of page 111).

Mrs. P. J. Webb, referring to the condition of Mr. Williams when Mrs. Williams took him to the hotel in San Angelo on the evening or in the early night of September 18th, testified:

> "When he came in, his gums were bleeding terribly, and he was exhausted and sick. We got him in his room as soon as he was able to go there, and called for a doctor. Dr. Nibling was out, and Dr. McAnulty came, about eleven o'clock, gave Mr. Williams a hypo

and tried to check the excessive bleeding of the gums. About thirty or forty minutes later Mr. Williams dropped off to sleep a little bit. Then he waked up again and his mouth was so filled with blood, he began spitting up blood" (Tr., pg. 121).

Thus it appears that Mr. Williams' gums were bleeding excessively in the afternoon and night of September 18th, and continued to bleed even as late as September 20th or 21st.

In view of this testimony the objection made by Respondent falls.

We further submit that the alleged "minor discrepancies" referred to in Respondent's brief fade away when the testimony as a whole, and not simply an isolated portion or paragraph, is considered.

However, as Respondent concedes said alleged minor discrepancies to be immaterial, we forbear detailed discussion of same.

There remains only the principal objection made to the hypothetical question, that is, the objection as to the sufficiency of the evidence upon which the question is based. This objection is so related to Respondent's general assignment challenging the sufficiency of the testimony that a separate discussion thereof would be mere repetition.

The hypothetical question was propounded after plaintiff had put on the stand twelve witnesses; after all of plaintiff's evidence on the question of mental incapacity had been adduced, with the exception of the testimony of Dr. White, he being the last witness before plaintiff rested.

The record in this case shows that Dr. White sat in the court room and heard that evidence (Tr., pg. 140).

He stated that, according to his recollection of the testimony, "practically everything had a basis in the evidence which he (counsel) included in the hypothetical question" (Tr., pg. 140).

He mentioned one matter—not included in the hypothetical question—relating to testimony that on the occasion in question, the insured remarked he was a sick man.

No objection was made as to the form of the hypothetical question or as to the form of the answer thereto.

Some courts have shown a tendency to adopt the popular skeptical attitude towards all alienists. The fact that in some instances this attitude may be well-founded, gives no warrant for scoffing at the opinion of *all* specialists in that line; any more so than in the case of other classes giving opinions as experts—as attorneys, diagnosticians, surgeons, engineers. Divergence of opinion among professional men constitutes no argument that the opinion of *every* professional man is entitled to no weight.

Especially is this true as to one shown to be eminently qualified, as in the case of Dr. White; moreover, shown to have held high positions of trust and confidence. To these considerations we attach the greatest importance in every line of human endeavor; in every avenue of thought; why then, disregard them when the subject of mental powers is under inquiry?

Psychology is as nearly an exact science as is medicine. Again, the relation of body to mind can not be denied, respondent's cited illustration of Mahatma Gandhi to the contrary notwithstanding.

While not of universal application, the old Roman maxim, *mens sana in sano corpore,* was based upon human experience.

Here then, we have a witness of unchallenged professional standing, with an unsullied record of a life devoted to the study of the human body and the human mind; a physician specializing for a quarter of a century in nervous and mental diseases; honored by the State of Texas with positions of trust and confidence; entrusted at different times with the

care and supervision of the unfortunate inmates of every state asylum for the insane (with one exception).

Upon the evidence adduced by plaintiff and outlined in the hypothetical question, he found a sufficient basis for an opinion as to the mental incapacity of the insured on September 18, 1931.

Under the record in this case, and in view of the eminent ability of the witness, is not the fact that he so found such sufficient basis, a circumstance worthy of consideration—though not necessarily controlling—in judging of the sufficiency of the evidence to show mental incapacity?

Respondent stresses the testimony of Dr. Nibling on cross-examination. On direct examination he had testified that on September 20th and 21st, Mr. Williams was "nervous and more or less unstrung". (Tr., pg. 111); that on September 11th, "he was suffering considerably with hiccoughing and pain in his abdomen, and he took a rather heavy dose of morphine to relieve it;" that the patient had some fever and a rather fast pulse; that from September 12 to September 16th, X-ray and laboratory tests were made in the clinic; that they were inconclusive, but they "showed enough pathology for me to believe there was some serious trouble around the gall-bladder or liver" (Tr., pg. 110); that the X-ray showing pus at the roots of the teeth, he recommended that all the patient's teeth be pulled.

It is quite evident that Dr. Nibling was puzzled; and deeply concerned in trying to determine the nature of the malady; an unusually baffling problem confronted him. Is it not a reasonable conclusion that he devoted his attention to the reading of X-rays and inspection of laboratory findings rather than to the patient's mental condition?

All this time the patient was growing worse. The following quotation is from Mrs. Williams' testimony: "We changed to Dr. Marberry about the first of October."

On direct examination, Dr. Nibling, when asked about the probable effects of toxins and infections, as in the case

of Mr. Williams, testified that they "would cause a general upset of the whole mechanism" (Tr., pg. 111).

The following is taken from his direct examination on page 112 of the transcript:

> "Q. Would this absorption affect or react upon the brain or mind in any manner or the nervous system?
>
> "A. Well, in a way I believe it would. I cannot state definitely how, except that a poisonous condition just upsets the mental equilibrium."

On cross-examination he could not recall any topic of conversation with Mr. Williams "other than his ailments—his condition" (Tr., pg. 113).

All these observations go to the weight of Dr. Nibling's adverse testimony on cross-examination; and are made in view of the stress laid thereon by respondent. Respondent characterizes said testimony as "frank and important"—of so much importance that on the strength of it respondent says:

"It is uncontradicted, then, that Williams was in the possession of his mental powers both two days before and also even two days after the signing of the instrument"—respondent's brief in opposition to the petition, page 117.

We respectfully submit that this quoted statement of respondent ignores all else in the record.

Dr. Nibling's testimony on cross-examination simply presents a conflict in the evidence; even conflicting, to some extent, with his own testimony on direct examination. As to the weight thereof, the jury heard him testify, observed his demeanor on the witness stand, and resolved the conflicts against the contentions of respondent.

Petitioner respectfully submits that tested by the rule laid down by this high court and universally recognized, the evidence in this case is of such probative force that respondent's assignment challenging the sufficiency thereof, and assailing the verdict, must fall.

How can it be said of the verdict in this case, under the record here presented, that "all reasonable men exercising an unprejudiced judgment would draw an opposite conclusion from the facts?" *Story Parchment Company* v. *Paterson Paper Parchment Company*, 282 U. S. 555, 51 Sup. Ct. 248 (Quotation is found on page 252, immediately preceding Sec. (7) of 51 Sup. Ct.).

The same test in different words is set forth in the opinion in *Wharton* v. *Aetna Life Ins. Co.*, 48 Fed. (2d) 37 (certiorari denied 52 Sup. Ct. 9), as follows:

> "Where the evidence is of such a character as reasonable men may reach different conclusions, the case should be submitted to the jury."

The following quotation is from the opinion in the case of *Sprencel* v. *U. S.*, 47 Fed. (2d) 501:

> "If the proof as to the material facts was such that reasonable minds might draw different conclusions, one of which would sustain the plaintiff's claim, then the court was not justified in taking the case away from the jury."

The following quotation is from the opinion in the case of *Union Pacific Ry. Co.* v. *Harris*, 158 U. S. 326, 39 L. Ed. 1003, 15 Sup. Ct. 843 (on page 845):

> "The railway company moved that the jury be instructed that, upon the evidence, the release was a complete bar to the action, which instruction the court declined to give, and defendant excepted; but, as there was evidence tending to sustain plaintiff's contention in relation to the validity of the release, the instruction was properly refused."

Again we quote from the opinion in the same case, that is, the case of *Railway Company* v. *Harris, supra* (15 Sup. Ct., pg. 845):

"The court charged the jury in this regard, in substance, as follows: 'A release of this kind is of the highest significance in general when it appears that the situation and circumstances of the parties show that it has been entered into with an understanding of the rights of the parties, respectively, and with intent to include all matters of difference between them'; and 'that when the parties are upon an equal footing, and there seems to be no reason to believe that any mistake has been made in respect to it, that neither party is at liberty to deny the force and effect of what it may contain; he is not at liberty to say that he did not read it or that he did not understand it'; but that when it appears that either party is in a situation as to his health, physical condition, or as to the state of his mind, that makes it probable that he acted without deliberation, without an understanding of the act with which he is charged, the instrument itself may be disregarded'; that in this instance, plaintiff, having been injured July 30th, and while he was lying in bed apparently quite ill, 'was approached by an agent of the defendant company, and was induced to sign the release which has been put in evidence before you,' and upon that 'it becomes a question in the first instance whether he was in a condition to know precisely what he was doing. He seems to have had in some degree and to some extent the possession of his faculties. He had used whiskey at the time of the accident, or shortly afterwards, and morphine had been administered to him on several occasions. There is a question as to the effect of the accident, how far he was disabled by it, and as to the effect of the drug and the whiskey, perhaps, on his mind; *whether he was then in a condition to deal with such a subject as was presented to him. If he was not, and you can say that his faculties were in such a state that he could not comprehend what he was doing, and the force and effect of the paper which he signed, you may say he is not to be charged with it.*" (Italics ours.)

POINT 2.

The purported dividend order dated September 18, 1931, is unavailing to respondent because same was procured by fraud.

The general circumstances surrounding the transaction of September 18, 1931, have already been stated. The circumstance—unexplained in this record—that on that occasion Mr. George T. Lee obtained a note from the insured payable to the order of The Union Central Life Insurance Company is discussed in our brief in support of the petition for the writ (on pages 63-64 and 65, under Point E).

But aside from that circumstance, we respectfully submit that respondent's own evidence, viewed in the light most favorable to respondent, shows, as a matter of law, fraud in the transaction of September 18, 1931.

"It is well settled in this state that material misrepresentations, though innocently made, relied and acted on by the party to whom made, constitute legal fraud." *Poindexter* v. *Davis*, 27 S. W. (2d), 139; quotation is from opinion by Commission of Appeals (in Supreme Court of Texas), page 141, citing a number of decisions by the Supreme Court and Courts of Civil Appeals.

The following portion of the deposition of the witness George T. Lee are deemed pertinent on this point:

Direct examination:

"I told Mr. Williams I had come to ask him to sign an instrument releasing the dividends on these policies to Lee & Lee so that they might be credited on a note that he had given for the premiums on the policies, and to execute a new note for the remainder of the debt. I told him that I was handling the matter for Lee & Lee, that I was an attorney, and not connected with the firm.

"Mr. Williams at first demurred, saying that he was 'peeved' at the company, etc., and did not want to sign

the instrument. We discussed other matters not related to the transaction some 15 or 20 minutes, and finally I persuaded Mr. Williams to sign a written order to the company releasing the dividends to Lee & Lee, and he executed a note for the remainder of his debt to Lee & Lee, for moneys advanced by Lee & Lee for the previous year's premiums. Mr. Williams had given Lee & Lee a note for the debt. (Tr., p. 150.)

"I told Mr. Williams that it was the dividends on the policies mentioned in that written order that I wished him to assign to Lee & Lee. I told him I wanted him to assign the dividends on all the insurance that he had. He seemed to understand thoroughly that it was the dividends on all those policies that he was directing the payment of to Lee & Lee. In the course of the conversation he had said that he was entitled to these dividends, that he didn't feel like giving those dividends to Lee & Lee, although he admitted the indebtedness. That was in the first part of the conversation. Later on, he agreed to assign the dividends, because he did owe Lee & Lee this money on the insurance, which he could not pay. He stated that he could not pay the notes.

"*I told him that the policies had lapsed, according to my information and belief, and that he was merely assigning something that did not belong to him, but was really Lee & Lee's and should properly go to Lee & Lee, inasmuch as they had paid the note which he had given for the premiums* which they had paid to the company themselves; that if he could not pay the premiums, that the least he could do would be to pay Lee & Lee these dividends, which were returnable to him on the lapsed policies, and give a note for the balance; and he finally agreed to it and did do it.

"Mr. Williams' failure to pay the premiums was mentioned *as the cause of the lapsed policies,* also the further fact that he had not paid the premiums for the year before, that is, for two years. He had given a note, and had not paid the note. I refer to the premiums of 1930 and 1931, and the note for the 1930 pre-

miums. It is correct that so far as the company was concerned the 1930 premium had been paid and that Lee & Lee had paid it to the Company, and not Mr. Williams, and Mr. Williams admitted that was true." (Tr., pages 152-153.) (Italics ours.)

Cross-examination:

"Q. You told Mr. Williams that since Lee & Lee had paid that money for the 1930 premiums and since he had failed to pay his 1931 premiums, his policies had lapsed, and that the dividends were payable?

"A. I explained to him that, as a matter of justice, they belonged to Lee & Lee.

"Q. They were payable in cash and were payable to them?

"A. Yes, sir, they ought to be paid to Lee & Lee. I told him they belonged to him unless he was willing to transfer them to Lee & Lee. (Tr., p. 155.)

"After he and Humlong concluded their conversation about the ranch and other things I simply *repeated my former statements,* and he said 'Well, there is nothing to do, I guess, but to sign this thing, but I'm sore about it.' He never did get to where he was delighted to sign it or anything like that. His consent to put his signature to the order was rather reluctantly given; he didn't jump at it.

"Yes, it was when Mr. Williams was having the conversation with me showing his attitude was quite hostile that Mr. Humlong injected himself into the conversation. He wanted to soothe him down; I didn't want him sore; you cannot transact business when a man is hostile to you, and I knew that I could not get what I wanted if he remained in that attitude." (Tr., p. 156.) (Italics ours.)

Recross-examination:

"The first part of the conversation between Mr. Williams and myself, in which he was consistently refusing my request must have been about five or ten minutes. Then Mr. Humlong broke into the conversa-

tion, and he and Mr. Williams discussed other things for about ten or fifteen minutes—about Mr. Williams' beautiful cattle, his good-looking crops, etc. After he and Mr. Humlong finished talking, I then talked to Mr. Williams again about five minutes before he began to indicate any kind of willingness in the matter." (Tr., p. 157.)

Redirect examination:

"Before I left for San Angelo I had the pleadings prepared to file a suit against Mr. Williams on the note for $1,643.63 and to run a garnishment against The Union Central Life Insurance Company. I may have told Mr. Williams during the conversation that in the event the instrument was not signed, there was no other alternative; I think perhaps I did tell him that."

Recross-examination:

"At the time Mr. Williams signed the instruments that I have identified he was fairly friendly; I don't think that he was happy over the situation." (Tr., p. 158.)

Thus it conclusively appears that George T. Lee, the attorney, stated and represented to the insured that all the insurance was at an end; that the only thing left was a sum of money accruing by virtue of dividends. True he did not use these *exact* words; but that he conveyed that idea and impression to the insured, and that the insured acted thereupon, are inescapable conclusions. Viewing the whole transaction in the light most favorable to respondent; and if the insured had any comprehension at all thereof.)

As we interpret its contentions, respondent takes the position that insured did have that understanding; contending that all insurance had terminated long prior to said

date; and that there was left for consideration on September 18, 1931, only a sum in cash arising from dividends; that the transaction related only to a disposition of this money.

We further understand respondent's position to be that if it be held that there was insurance in force on September 18, 1931, then respondent invokes said dividend order as a release or settlement extinguishing such insurance.

It clearly appears from the above quoted testimony of Mr. George T. Lee as well as from other portions of the record that P. H. Williams never—at any time—intended to relinquish or surrender insurance. He had refused to sign surrender forms (Tr., p. 97).

The general agents, Lee & Lee, in their letter to the home office under date of September 19, 1931, stated: "Our attorney has just returned from West Texas, where he went either to get a settlement with Mr. Williams or file suit against him with an ancillary proceeding against the company for the dividends. After Mr. Williams had found that we were desperately in earnest about suing him for $1,643.63 *and fastening these dividends so he couldn't get them*, he signed an order on the company directing that all of these dividends be paid to Lee & Lee" (Tr., p. 98). (Italics ours.)

Mr. George T. Lee, the attorney, used the term "lapsed" in talking to Mr. Williams. He was not talking to an insurance actuary or expert, and used that term in its ordinary sense—of slipping away (into oblivion, or out of existence); of becoming void or forfeited—extinguished.

Even by insurance companies and their agents the term is so used; as well as in its strictly actuarial sense—so much so as to lead to no little confusion.

When Mr. Lee said that his "information" was that the policy had lapsed, he was clearly referring to Lee & Lee, the general agents, as the source of that information—they

acting for the company in thus communicating to a policyholder information as to the status of policies taken out by him—policies which the company then held in its possession, and had so held since June, 1930; which Mr. Williams had not seen since that date. Mr. Pattison, respondent's assistant secretary, testified—by deposition—that the policies had, throughout said period of more than a year, and up until the time of the trial, been in the home office, at Cincinnati, Ohio (Tr., p. 84).

This was equivalent to an outright declaration that all the insurance had come to an end; had been extinguished.

These representations, even if made innocently and in all sincerity, were not true; through them, Mr. Lee, to use his own words, "finally persuaded" the insured to sign the instrument in question.

Incidentally, he testified that the money borrowed from Lee & Lee had paid *all* the 1930 premiums. That this was not true, and that in fact said money paid only a *part* thereof, and the insured paid the balance, is disclosed in the letter from the general agents to the home office (Tr., 96-97).

Again, similar confusion on this question is found in the statement in respondent's brief in opposition to the petition, under the heading "Facts With Reference to Lapse of Policy and Actual Payment of Dividend"—page 54.

> "The policyholder had paid each premium prior to that of June 10, 1931, and in so doing had applied the annual dividend as part payment (Tr., p. 159); but the policyholder had exhausted his borrowing power under his insurance in June, 1930, and, in addition, indulging the hope of improved financial condition within the ensuing twelve months, had borrowed from Lee & Lee $1,643.63 with which to maintain his insurance. But he had been unable to repay this sum even in part, and was wholly unable to settle in any way the premium of June 10, 1931."

The record discloses that respondent had issued to P. H. Williams six policies (Tr. 98). One of these—number 989355—had been assigned prior to September 18, 1931. The 1931 dividend of $184.75 on the assigned policy is not included in the purported "dividend order" (Tr. 151).

While this record does not disclose exactly how the matter was handled, it appears that the general agents obtained the amount of the 1931 dividend on the assigned policy also. The amount thereof added to the sum of $667.35 (the total of the 1931 dividends on the other five policies), gives an aggregate amount of $852.10, which the general agents obtained.

The particular policy introduced in evidence in this suit is number 940457. The 1931 dividend on same amounted to $74.80. The aggregate amount of all the 1931 dividends on all the policies was more than eleven times the amount of the 1931 dividend on said policy 940457. The annual premium on said policy 940457 was $449.10.

It is a well known fact that the larger the premium, the larger the dividend—*Atlantic Life Insurance Co.* v. *Pharr*, 59 Fed. (2d) 1024; *U. S. Life Ins. Co.* v. *Spinks*, 13 L. R. A. (N. S.) 1053, 126 Ky. 405, 96 S. W. 889. In fact, there is a definite fixed ratio between premiums and dividends; and the dividend formula used by respondent takes into account that ratio (testimony of Mr. Koeppe, respondent's assistant actuary—on cross examination). (Tr., 169-170.)

Bearing this in mind, a simple calculation demonstrates that that $1,643.63, which Mr. Williams borrowed from the general agents, was less than one-third of the aggregate amount of all the 1930 premiums.

These remarks are made in view of the fact that statements appear not only in the testimony of Mr. Lee but in respondent's brief, from which it might be inferred that the money borrowed from Lee & Lee paid all the 1930

premiums on all the policies. From this we do not mean to imply any criticism of respondent's counsel, as such statements are on their part inadvertent.

Mr. Lee, the attorney, testified that in the conversation with the insured on September 18, "Mr. Williams' failure to pay the premiums was mentioned as the cause of the lapsed policies, *also the further fact that he had not paid the premiums for the year before, that is, for two years*" (Tr. 152). (Italics ours.)

Of course, default in the payment of the note to Lee & Lee—a personal obligation of the insured to them—could not, in any way, affect the status of the insurance.

It is difficult to conceive how an attorney-at-law could understand otherwise; or how he could consider such a circumstance as at all pertinent in speaking of "the cause of the lapsed policies."

Do the samewhat vague remarks of the witness, following the above quotation, qualify his said statement as to what was "mentioned" as "the cause of the lapsed policies"?

We respectfully submit they do not; except to the extent that he was referring to the 1931 premium and to the note executed by the insured to Lee & Lee in 1930. Our contention is that he represented to the insured, in substance, that default in the payment of the note to Lee & Lee constituted a cause "of the lapsed policies."

The testimony referred to has been copied in full hereinabove in connection with those portions of the deposition of George T. Lee deemed material hereunder; and we refer thereto and to the record (beginning with the last sentence on page 152 and concluding on page 153) for the testimony characterized above as "vague remarks."

On redirect examination by counsel for respondent, Mr. Lee testified, in respondent's behalf:

> "Q. Did you make any statement to Mr. Williams as to whether or not you had any connection with

The Union Central Life Insurance Company, and if so, what the connection was?

A. I told him that I was not connected with the insurance end of The Union Central Life Insurance Company, did not represent them; that I was not their attorney, and that in this particular instance I was a lawyer in Dallas representing Lee & Lee, the general agents for the company; that I had no authority to bind The Union Central Life Insurance Company to any action whatever; that my only purpose was to secure a release of those dividends to Lee & Lee." (T. 156-157).

Although he so testified, this record shows that on that occasion he did obtain a note signed by P. H. Williams and payable to the order of The Union Central Life Insurance Company (Tr. 99). This action on his part respondent did not repudiate.

But aside from that, can respondent invoke the purported "dividend order" freed from representations made to obtain it?

Before the attorney made the trip from Dallas to San Angelo and the Williams farm, the home office was advised of the course of conduct being pursued by its general agents (Tr. 96-7).

And the home office likewise had information from its general agents—as well as notice otherwise—as to the constant desire of the insured to hold on to his insurance (Tr. 97).

Immediately after the transaction of September 18, the general agents wrote to the home office a letter (dated September 19, 1931), setting forth what had been accomplished by the attorney, and advising, in substance and effect, that the transaction had been handled as one *relating to the disposition of money* (Tr. 98-99).

And enclosed with that letter were a note signed by P. H. Williams, payable to the order of The Union Central Life

Insurance Company; and a "dividend order" referring to dividends "on policies now lapsed."

That the insured had consistently refused to sign surrender forms; that he wanted *insurance*, not *cash*, for the dividends—these facts were well known to the home office before any action whatsoever was taken concerning said "dividend order."

Mr. Pattison, respondent's assistant secretary, testified that the check to Lee was issued September 28, 1931 (Tr. 160). Why it was not issued sooner does not appear.

We submit that any reasonably prudent person, situated as was respondent, and with the information it had as to the desire of P. H. Williams to hold on to his insurance, would have contemplated and realized that in the transaction of September 18 the said attorney had discussed the status of the policy or policies, and had led Mr. Williams to believe that all insurance was at an end; and had thereby procured his signature to the "dividend order." (Without taking into account the note to The Union Central Life Insurance Company; and viewing the case in the light most favorable to respondent.)

Under these circumstances, the situation presented is the same as if the general agents themselves and in person had conducted the transaction of September 18.

In Texas, as elsewhere, general agents are, in effect, in general dealings with policy-holders, the *alter ego* of the company. *Commonwealth Casualty Company* v. *Coogle*, 31 S. W. (2d) 362.

The responsibility of the principal is not affected by the fact that the general agents primarily had a purpose of their own to serve. *Gleason* v. *Seaboard Co.*, 278 U. S. 349, 49 S. Ct. 161, 73 L. Ed. 415.

It was certainly within the scope of employment of the general agents to give information to him as to the status of his insurance; this authority was, with the knowledge

and acquiescence of respondent, delegated to the attorney, Mr. Lee, who, thereupon for that purpose, became the agent of respondent. The following quotation is from Vol. 2, Corpus Juris, p. 849:

> "Acts of fraud by the agent, committed in the course or scope of his employment, are also binding on the principal, even though the principal did not in fact know of or authorize the commission of the fraudulent acts, and although he derives no benefit from the success of the fraud."

But if Mr. Lee, the attorney, had entered into the transaction of September 18, without any authority whatsoever, respondent nevertheless, in this case, would be responsible for what he did and said there, under the doctrine of adoption.

Invoking the transaction of September 18, respondent must take same with all its burdens.

The following quotations are from the opinion in the case of *Henderson* v. *San Antonio M. G. Ry. Co.*, 17 Tex. 560, 67 Am. Dec. 675 (one of the leading cases cited to this day by the Texas Supreme Court, as announcing the applicable rule) (the opinion was written by Wheeler, Justice; the quotations are from the Tex. (Sup.) Report, pages 575-577).

> "And even though the agent has transcended his authority in making the contract, yet if the principal ratify it, and make the contract his own by availing himself of the benefit of it, he is liable in like manner as if he had personally made the contract. And if the agent has made misrepresentations, the principal is bound by them, for he cannot ratify the contract and avoid the responsibility of the representations, etc., which formed its basis; but he must avoid or ratify the contract *in toto* (Story on Con., sec. 496). This doctrine was affirmed by Judge Story in *Hough* v. *Richardson* (3 Story, 689), and I quote the language of the

learned judge as asserting a principle applicable to the facts of the present case: 'The sale, then, being made by Moulton, not as himself the owner—which he was not—but as the agent of the owners, it follows that they are bound by his representations, made at the time, touching the sale, as a part of the *res gestæ;* and as to the purchasers, it makes no difference whether these representations were made by the authority of the owners or not, if they were material to and constituted the basis of the sale, and it was made by the purchaser on the faith and credit of these representations. Under such circumstances the sale is good in the entirety, or not good at all. The owners have no right to insist upon the validity of the sale independent of the representations. *The whole must be taken together as a part of one and the same transaction. It cannot be adopted in part and rejected in part. It must be taken as good for the whole or not at all.*' (And see 1 Story 172; 3 id. 612, 729.)

The trial court therefore erred in charging the jury that, in order to set aside the contract on the ground of the fraudulent representations of the agent, they must have been made with the knowledge and by authority of the company. The representations of the agent, acting within the scope of his authority and employment, are treated as the representations of the principal himself, and are binding upon him, whether he knew of them or not. And, as we have just seen, though he exceeded his authority in making the contract, yet, as the company, by accepting a conveyance from the trustee and taking the benefit of the contract, have ratified and *adopted his acts and made them their own,* they are liable in like manner as if they had personally done the acts. *They must take them all together, and with all their consequences.*

Then, as to the proposition embraced in the charge, that, to avoid the contract, the false representations must have been made 'with the intent to deceive and defraud the plaintiff,' the court was equally in error. 'If a material misrepresentation be made, although it

be not embodied in the contract, *it is considered as a constructive or legal fraud, although it be made without any willful intention to deceive, but merely through carelessness, mistake or ignorance'* '' (Italics ours).

The following quotation is from the opinion in the case of *Buchanan* v. *Burnett,* 102 Tex. 492, 119 S. W. 1141, 132 Am. St. Rep. 900:

"It is urged by the plaintiff in error that the evidence in this case shows only that the plaintiff in error expressed his opinion of the reliability of his title, and therefore it constituted no cause for rescission of the sale. Although the statement made by Buchanan to Burnett embodied a conclusion drawn from the facts relative to the title, it was in effect a representation that the facts which would constitute a good title to the land existed. It was not an opinion as to the legal effect of known facts and muniments of title for which the seller would not be responsible. The ignorance of Burnett on the subject of land titles adds force to the conclusion that the representations made by Buchanan had the effect of a statement that all the facts existed which would constitute a good title to the land.

The plaintiff in error requested the trial court to give to the jury a charge to the effect that, in order for Burnett to avail himself of the misrepresentations of title, he must not only have been ignorant of the existence of the defect, but must have relied 'solely' upon that representation in making the purchase. The trial court refused to give the requested charge, and the Court of Civil Appeals correctly held that it was sufficient if Burnett relied upon the false representations made by Buchanan and would not have made the purchase if the representations had not been made. There is no error in this holding.

The fact that Buchanan believed that he had a good title to the land when he sold it and when he made the deed to Burnett was unimportant, if in fact Burnett believed the representations to be true and relied upon

them, making the purchase upon the faith of the statements made by Buchanan'' (119 S. W. 1142).

The record discloses that on November 12, 1931, respondent wrote to petitioner's attorney, advising that the policy ''lapsed without value for failure to pay the premium due June 10, 1931. At time of lapse the outstanding indebtedness by way of policy advance and interest exhausted all equity. Since there is no liability on the part of this company, proof of death will not be required'' (Tr. 100).

It will be noted that no mention was made of the ''dividend order.''

Respondent invoked the ''dividend order'' by a First Amended Original Answer, filed October 20, 1932 (Tr. 35).

In her First Supplemental Petition, filed on the same date—October 20, 1932—petitioner alleged that tender of the amount of the 1931 dividend, with ten per cent interest, had been made; and had been refused; and that she tendered same into court (Tr. 54; Section IX, alleging tender, on p. 66).

In invoking the ''dividend order'' in its said First Amended Original Answer, filed October 20, 1932, respondent did so in the following language:

> ''But it (defendant) subsequently received from the said Williams a written instrument, dated September 18, 1931, made and executed by the said Williams, directing the payment of the dividend of $74.80 to Lee & Lee of Dallas, Texas, and in compliance with and in reliance on said order the defendant paid the said sum to the said Lee & Lee, and such payment to the said Lee & Lee, being a payment to the said Williams' order, constituted a payment in cash to the said Williams of the said dividend'' (Sub. 11 of said pleading, Tr. 52-53).

A stipulation as to tender appears on page 82 of the record.

The same situation as to tender exists with reference to all amounts mentioned in said dividend order.

We take it that respondent now makes no contention relative to this matter.

We respectfully submit that, without reference to the plea of mental incapacity, and viewing the evidence in the light most favorable to respondent, the transaction of September 18, 1931, affords to respondent no protection; being nullified, as a matter of law, by fraud.

POINT 3.

Even under respondent's contentions, and under respondent's own evidence, the purported dividend order was signed by the insured under a mistake as to his rights; said mistake being induced by acts and representations of respondent and its agents.

The foregoing discussion is generally applicable hereunder.

That is, viewing the transaction of September 18 in the light most favorable to respondent, and without reference to the plea of mental incapacity, the evidence conclusively shows that (if the insured had any understanding at all of same, and if same be considered as involving the subject matter of insurance) he was mistaken as to his rights in such subject matter—such mistake being induced by acts and representations of respondent and its agents and representatives.

Without repeating the evidence or discussion, we submit that it clearly appears that the insured did not realize or understand his then existing rights relating to insurance.

The applicable rule is stated in Ruling Case Law, Vol. 23, page 388, as follows:

> "While ignorance of general law does not excuse, ignorance of one's personal, private right, under the law, arising out of existing facts, does excuse."

In the case of *Wheeler* v. *Smith,* 13 L. Ed. 44, 9 Howard 55, 50 U. S. 53, this situation was presented: Wheeler had signed a compromise agreement and a release relating to a will under a mistaken belief as to his rights under the will. The following quotation is from the concluding portion of the opinion in that case (pp. 80-81 of U. S. Report):

> "But in making the compromise, the parties did not stand on equal ground. * * * And it appears to us that the agreement, under the circumstances, is void. It cannot be sustained on principles which lie at the foundation of a valid contract. The influence operating upon the mind of the complainant induced him to sacrifice his interests. *He did not act freely and with a proper understanding of his rights.*" (Italics ours.)

Conclusion.

With reference to respondent's criticisms of the court's charge, we submit that when the charge is considered as a whole, the objections thereto fall.

With reference to the contention relating to the constitutionality of Article 4736, Revised Civil Statutes of Texas (the penalty statute), we submit that is a matter long since settled by a uniform line of decisions, both by the Supreme Court of the United States and by the appellate courts of Texas (cited in respondent's brief).

In view of the fact that prior to the commencement of this litigation respondent predicated its claim of nonliability on the contention that "the policy lapsed without value for failure to pay the premium due June 10, 1931"; and that "at the time of lapse, the outstanding indebtedness, by way of policy advance and interest, exhausted all

equity" (Tr., p. 100)—in view of that, is the position which respondent takes in this case with reference to the transaction of September 18 tenable?

The following quotation is from the opinion in the case of *Ohio & M. Ry. Co.* v. *McCarthy*, 96 U. S. 258, 24 L. Ed. 659 (concluding paragraph of opinion):

> "Where a party gives a reason for his conduct and decision touching anything involved in the controversy, he cannot, after litigation is begun, change his ground and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is stopped from doing it by a settled principle of law."

An examination of the judgment and the verdict discloses that the amount of recovery was arrived at through the following calculations:

Face amount of policy minus the loan equals	$9,101.12
10 per cent attorneys' fees, as per stipulation of the parties, equals	910.00
12 per cent penalty on the sum of $9,101.12 equals	1,092.13
Interest allowed equals	409.50
Total (amount of judgment) equals	$11,512.75

The amount of the interest allowed, $409.50, is 6 per cent interest on the sum of $9,101.12 for a period of nine (9) months—from January 1, 1932, to October 1, 1932. Hence, it is evident that there was not taken into consideration any interest for the last half of the month of October, 1931, the months of November and December, 1931, and the month of October, 1932, prior to the date of the judgment, October 24. Thus it appears that interest for periods aggregating more than three months is not charged against respondent;

said interest not charged far exceeding the amount of the 1931 dividend of $74.80. Thus respondent, in the recovery herein, has already, in effect, been allowed credit for said dividend.

WHEREFORE, petitioner prays that the judgment herein of the Circuit Court of Appeals be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

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